

### **REMARKS**

Claims 27-56 are now pending in the present application. Consideration of the pending claims is respectfully requested. Previously, Claims 1-26 were cancelled and substitute new claims 27-56 were added. Claims 27, 35 and 47 have been amended in accordance with Examiner's remarks.

The present Response is intended to be fully responsive to all points of rejection previously raised by the Examiner and is believed to place the application in condition for allowance. Favorable reconsideration and allowance of this application is respectfully requested. No new matter has been added by any of the amendments. Applicant respectfully requests reconsideration and withdrawal of the Examiner's rejections in view of the foregoing amendments and following remarks.

The Examiner has rejected claims 35, 37, 38 and 43-46 under 35 U.S.C. §102(b) as being anticipated by Carew et al. (U.S. Patent No. 6,044,996). In addition, the Examiner also rejected claims 27-34, 36, 40, 42, 47-50 and 52-56 under 35 U.S.C. §103(a) as being unpatentable over Ogg (U.S. Patent No. 6,044,097) in view of Carew et al. (U.S. Patent No. 6,044,996). Applicant has amended independent Claims 27, 35 and 47 so as to define the invention more particularly and distinctly in order to overcome the technical rejections and define the invention patentably over the prior art cited by the Examiner.

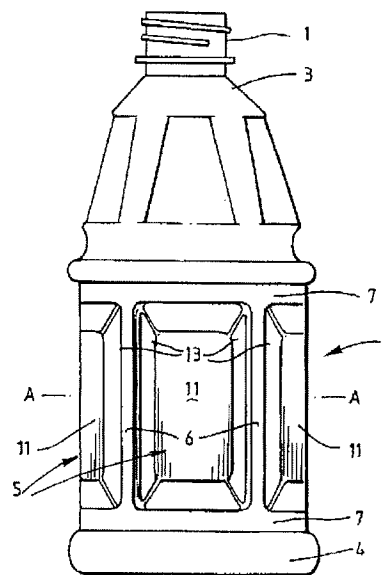
### **CLAIM REJECTIONS – 35 U.S.C. § 102**

#### **Claims 35, 37, 38 and 43-46**

The Examiner has rejected claims 35, 37, 38 and 43-46 under 35 U.S.C. § 102(b) as being anticipated by Carew et al. (U.S. Patent No. 6,044,996). The Examiner stated that:

Carew [996] discloses a molded, thermoplastic container capable of packaging a single stack of fragile articles, the container comprising a tubular body with central longitudinal axis, the body sidewall has a plurality of flowing geometry mechanisms in the form of lateral flexible hinge areas (hinges that connect panel 5 to horizontal lands 7 as shown in Fig. 1, 2, and 5, in Fig. 5 the hinge is in the form of a double-S) and a weakened panel area (the panel is rigid but allowed to move inwardly due to the flexibility of the hinge areas), the side wall has a permanently closed base, a middle section and a hermetically sealable upper section, the base and upper section having circular lateral cross sections of substantially equivalent diameters.

Claim 35 has been amended. Claims 37, 38, and 43-46 depend from Claim 35. Applicant submits that the claims as amended define over the Carew et al. '996 container. Carew et al. '996 does not teach that the hermetically sealable portion of its upper section and the closed lower base section have circular lateral cross-sections of substantially equivalent diameters. While the Carew et al. '996 includes a generally cylindrical body portion 2, its upper section includes a narrowing neck-to-body transition 3 that culminates in a neck 1 having a sealable opening that has a substantially narrower diameter than the that of the closed lower base section 4. Indeed, the claims of Carew et al. '996 require that its container include a base, a body and a narrowing neck portion. In contrast, the container of the present invention features an upper section having a hermetically sealable opening, which has a circular cross-section of similar diameter to that of a lower base section. Thus, the container of the subject invention is able to accommodate a stack of fragile articles having a lateral cross-section more approximate in size to the lateral cross-section of the lower base section.



**Carew et al '996**  
Hot Fill Container

Rejection under §102 for anticipation requires that the single reference teach each and every element or step of the rejected claim. *See, Atlas Powder v. E.I. DuPont*, 750 F.2d 1569, 224 USPQ 409 (Fed. Cir. 1984). A prior art reference anticipates the claimed invention under 35 U.S.C. § 102 only if every element of a claimed invention is identically shown in that single reference, arranged as they are in the claims. *In re Bond*, 910 F.2d 831, 832, 15 U.S.P.Q.2d 1566, 1567 (Fed. Cir. 1990). It is submitted that Examiner's continued rejection under §102 fails to meet this test.

Carew et al. '996 does not show every element of the claimed invention, and therefore, does not anticipate the claimed invention. Thus, a rejection under 35 U.S.C. § 102 is improper. Applicant respectfully requests Examiner to withdraw this rejection.

**CLAIM REJECTIONS – 35 U.S.C. §103(a)****Claims 27-34, 36, 40, 42, 47-50 and 52-56; and 39**

The Examiner rejected claims 27-34, 36, 40, 42, 47-50 and 52-56, under 35 U.S.C. §103(a), as being unpatentable over Ogg (U.S. Patent No. 6,044,997), in view of Carew et al. (U.S. Patent No. 6,044,996). The Examiner also rejected claims 39, under 35 U.S.C. §103(a), as being unpatentable over Carew et al. (U.S. Patent No. 6,044,996), in view of Ogg (U.S. Patent No. 6,044,997). The Examiner has stated that:

Ogg [997] discloses a thermoplastic container capable of hermetically sealing a single stack of fragile articles, comprising: a tubular body having a central longitudinal axis, the body has a sidewall positioned between a closed bottom and a hermetically sealable open top end, the sidewall has an oval lateral cross section (at section 4-4) at the topmost portion of the sidewall where the sidewall transitions to the open top end. This topmost portion of the sidewall is considered the topmost portion of the middle section for claim 47. Ogg [997] discloses the invention except for the flowing geometries mechanism and the top end having a circular cross section. Carew et al. [996] teaches a plurality of flowing geometries mechanism are positioned at a height just beneath where the top most portion of the sidewall transitions into the top open end. Carew et al. [996] also teaches the circular cross sections for both the top and bottom portions and these portions have substantially equivalent diameters. It would have been obvious to add the flowing geometries mechanism to Ogg's [997] container in order to avoid uncontrolled distortion of the container wall which results in an unsightly appearance. It would have been obvious to change the slightly oval cross section of Ogg's top end to be circular to conform to the container's outermost dimensions to other circular cross sections of similar containers to have uniformity in outer dimensions which would allow easier packaging of the container because otherwise, special provisions would have to be made for odd sized containers.

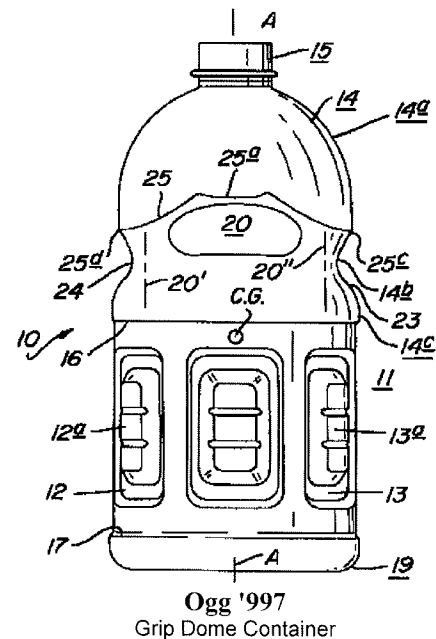
**WRT Claim 39**, Carew et al. [996] discloses the invention except for parallel grooves. Ogg's [997] panels have parallel grooves. It would have been obvious to add parallel grooves to Carew et al. [996] weakened panels to add strength to reinforce these panels and prevent unwanted deformation or distortion.

Claims 27, 35 and 47 have been amended in view of Examiner's comments. Claims 28-34 depend from Claim 27; Claims 36, 40 and 42 depend from Claim 35; and Claims 48-50 and 52-56 depend from Claim 47. Applicant submits that the claims, as amended, are non-obviousness despite the teachings of Ogg '997 in view of Carew et al. '996, and vice-versa. Neither Ogg '997 nor Carew et al.'996 teach, suggest, or give any incentive to make the needed changes to reach the presently claimed invention.

“A prior art reference must be considered in its entirety, *i.e.*, as a whole, including portions that would lead away from the claimed invention.” MPEP §2141.02. A reference may be said to "teach away" from the claimed invention when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the claimed invention, or

would be led in a direction divergent from the path that was taken by the applicant. *In re Gurley*, 27 F.3d 551, 553, 31 U.S.P.Q.2D 1130, 1131 (Fed. Cir. 1995).

Ogg '997 does not teach or suggest that its container includes an upper section having a hermetically sealable opening, which has a circular lateral cross-section of substantially equivalent diameter as the lateral cross-section of a lower base section. Indeed, as shown in the figure at right, the Ogg '997 container comprises a gripable container 10 having a body portion 11, which may be of tubular cross section (*i.e.*, cylindrical or rectangular), having a plurality of circumferentially spaced vacuum panels, (*e.g.*, 12, 13). The container 10 further includes a dome portion 14 superposed on the body portion 11, which progressively narrows to a conventional flanged finish 15, which may include threads adapted to receive a cap. (see column 2, line 52 – column 3, line 16) Thus, as previously noted



with Carew et al. '996, Ogg '997 does not teach that the hermetically sealable opening of its upper section and the closed lower base section have circular lateral cross-sections of substantially equivalent diameters. In contrast, the container of the present invention features an upper section having a hermetically sealable opening, which has a circular cross-section of equivalent diameter to that of a lower base section. Thus, the container of the subject invention is able to accommodate a stack of fragile articles having a lateral cross-section more approximate in size to the lateral cross-section of the lower base section.

The teachings of Carew et al. '996 and Ogg '997 teach away from the subject invention by inherently limiting the size of the opening to a cross-sectional diameter substantially less than that of the closed base section. This inherently constricts the size of fragile articles that can be placed in the container to the cross sectional area of conventional flanged finish 15. While such constriction is inconsequential or even desirable in applications involving liquids, when applied to containers for holding dry fragile articles, such a constriction adversely affects the overall utility of the container.

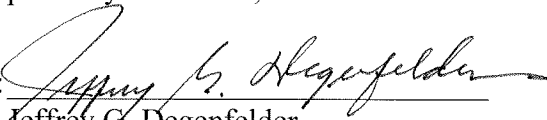
Neither Ogg '997 nor Carew et al. '996, either alone or in combination, teach or disclose every element of Applicant's invention. Examiner has not established a *prima facie* case of obviousness, and the rejection of claims 27-34, 36, 39, 40, 42, 47-50 and 52-56 should be withdrawn.

## CONCLUSION

It is respectfully urged that the subject application is patentable and the claims are now in condition for allowance. Applicant requests reconsideration of the application and allowance of the claims. If there are any outstanding issues that the Examiner feels may be resolved by way of a telephone conference, the Examiner is cordially invited to contact Jeffrey G. Degenfelder at 972.367.2001.

The Commissioner is hereby authorized to charge any additional payments that may be due for additional claims to Deposit Account 50-0392.

Respectfully submitted,

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